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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY, as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Appellants,

vs.

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation,

Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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Question Presented

May a municipality prohibit the attachment of signs, without regard to content, to specified categories of public property in order (1) to reduce visual clutter which mars the aesthetic quality of the environment, (2) to prevent traffic and other hazards and (3) to preserve much of such property for its primary use?

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October Term, 1982

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY, as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Appellants,

vs.

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation,

Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

The Members of the City Council of the City of Los Angeles, the City of Los Angeles and Edward D. Longley as Director of the Bureau of Street Maintenance of the City of Los Angeles (hereinafter referred to collectively as "the City") appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit herein, opinion filed July 30, 1982, petition for rehearing denied September 10, 1982,

wherein the court concluded that a Los Angeles city ordinance is repugnant to the First and Fourteenth Amendments to the United States Constitution.[1/]

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit from which this appeal is taken appears in Appendix "A" hereto and is reported at 682 F.2d 847. The order denying a petition for rehearing appears in Appendix "B" hereto. The unpublished Findings of Fact and Conclusions of Law of the District Court appear in Appendix "C" hereto.

Jurisdiction

This is an appeal from a final judgment of the United States Court of Appeals for the Ninth Circuit. In its opinion, the Court of Appeals held that a Los Angeles city ordinance is unconstitutional on its face as repugnant to the First and Fourteenth Amendments to the United States Constitution. That ordinance prohibits persons from posting signs, regardless of content, on certain enumerated categories of public and utility property.

A notice of appeal to this Court from that judgment was timely filed with the Clerk of the United Staes Court of Appeals for the Ninth Circuit on October 4, 1982. This appeal is being docketed in this Court within 90 days from September 10, 1982, the date of entry of final judgment below.

1/ The appellees are Taxpayers for Vincent, an unincorporated political association, and Candidates' Outdoor Graphics Service, a California corporation.

Constitutional and Ordinance Provisions Involved

1. The First Amendment to the Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech. . ."

2. The Fourteenth Amendment to the Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty or property, without due process of law; . . ."

3. The ordinance involved is Los Angeles Municipal Code Section 28.04. Its contents are set forth in Appendix "E" hereto.

Statement of the Case

During the political campaign just prior to the 1979 primary municipal election in the City of Los Angeles, the appellees attached political campaign signs to the cross wires of utility poles in the City. City employees, acting pursuant to Municipal Code Section 28.04, removed those signs. The appellees filed suit in the United States District Court for the Central District of California, seeking an injunction, damages and a declaration that Section 28.04 is unconstitutional on its face. The jurisdiction of the Federal courts was premised on 28 U.S.C. §§1343, 2201 and 2202, and 42 U.S.C. §1983. The District Court granted the City's motion for summary judgment, upholding the constitutionality of the ordinance. The Court of Appeals reversed on

the ground that the ordinance is unconstitutional on its face.

Section 28.04 prohibits the posting of signs, regardless of content, on certain specified types of public and utility property (e.g., traffic signs, street lights, utility poles and utility pole cross wires). The ordinance does not ban all political signs within the City. It does not totally prohibit the display of such signs along the streets or even on all public property.

The District Court found, *inter alia*, that tens of thousands of signs are illegally posted and removed every year (App. 17a), that such signs (including those posted on utlity pole cross wires) "constitute a clutter and visual blight" (App. 18a), that some signs block views and create traffic hazards (App. 18a), and that certain signs posted on utility poles may create hazards to workers scaling the poles (App. 18a). The District Court also found that both political and nonpolitical signs are found posted and are removed without regard to their content (App. 17a).

The Question Presented Is Substantial

This case raises the substantial and unsettled constitutional issue of whether a municipality may prohibit the attachment of signs to specified categories of public property in order to reduce visual clutter which mars the aesthetic quality of the environment, to prevent traffic and other hazards and to preserve much of such property for its primary use.

Although this Court has ruled on the extent to which the First Amendment protects many other methods of communication, it has yet to address whether a municipality

may regulate the proliferation of signs on utility poles, light standards, traffic signals and other categories of public property which line the streets.

This case is important for two reasons. First it concerns a collision between First Amendment values and substantial governmental interests. Second, the opinion of the Court of Appeals is at odds with this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). 2/

I. IMPORTANT FIRST AMENDMENT VALUES AND SUBSTANTIAL COUNTERVAILING PUBLIC INTERESTS COLLIDE IN THIS CASE.

The City does not deny that the First Amendment concerns of the appellees involved here are substantial. Indeed, the First Amendment right to freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 672 (1971). Here, appellees sought to communicate their support for a political candidate through one effective and inexpensive means.

However, to raise a First Amendment inquiry is not to decide it. As this Court stated in *Metromedia, supra*, "at times First Amendment values must yield to other societal interests." 453 U.S. at 501. Whether a particular governmental regulation is valid depends not only on the First Amendment values at stake but, as well, on the degree to which the regulation impedes those values and on the nature of the societal interests involved.

2/ Moreover, the decision appealed from is directly contrary to *Sussli v. City of San Mateo*, 120 Cal.App.3d 1 (1981), *cert. denied*, 454 U.S. 1085 (1981) (upholding a virtually identical ordinance) and *Frumer v. Cheltenham*, 545 F.Supp. 1292 (E.D. Pa. 1982) (upholding an almost identical restriction).

In this case, the societal interests are substantial. [3/]

It can be no longer questioned that enhancing the aesthetics of a community is a substantial goal of government. ***Metromedia, supra***, 453 U.S. at 507-508. Indeed, as far back as 1954, this Court proclaimed that "[t]he concept of the public welfare is broad and inclusive. [Citation.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." ***Berman v. Parker***, 348 U.S. 26, 33 (1954). ***See also Penn Central Transportation Co. v. New York City***, 438 U.S. 104, 129 (1978); ***Village of Belle Terre v. Boraas***, 416 U.S. 1, 9 (1974).

The City's ordinance is concerned with the visual clutter caused by literally tens of thousands of signs plastered all along its streets and highways. No less than billboards, such signs of all shapes and descriptions, posted indiscriminately on various publicly owned devices, are an eyesore which contributes to urban blight.

This concern, moreover, prevails citywide. It is no less important to reduce unsightliness in the poorer residential neighborhoods then it is to preserve the well-groomed appearance of middle and upper class areas. Likewise, persons who work or shop in all of the City's commerical and industrial districts are entitled to be free of the visual clutter which the City's ordinance seeks to reduce.

[3/] In addition to reducing visual clutter, the ordinance promotes the City's interests in traffic safety (*see Metromedia, supra* at 507-508), the safety of workers climbing utility poles, and the preservation of City property "for the use to which it is lawfully dedicated." (***Adderley v. Florida***, 385 U.S. 39, 47 (1966).)

II. THE COURT OF APPEALS' OPINION IS AT ODDS WITH THIS COURT'S DECISION IN *METROMEDIA*.

Essential to the decision below was the Court of Appeals' treatment of the "visual clutter" issue. Although the Court conceded that "promoting an aesthetic environment by reducing visual clutter is a substantial government interest," it applied the wrong test in deciding that Section 28.04 is not "significantly related to that interest." (App. 9a; 682 F.2d at 851-852.)

Relying on language in Mr. Justice Brennan's concurring opinion in *Metromedia, supra*, the Court of Appeals stated:

> "Before deferring to the City's judgment, we must be convinced that the City is 'seriously and comprehensively addressing aesthetic concerns with respect to its environment.' *Id.* [Citation.] Here the City has not offered to demonstrate that it is engaged in 'a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment.'"
> (App. 10a, 682 F.2d at 852; quoting from *Metromedia, supra*, 453 U.S. at 531.)

Such burden represents a minority view inconsistent with First Amendment doctrine established by this Court. In imposing the burden, the court below misread and misapplied the decision of this Court in *Metromedia, supra*.

Speaking for himself and Mr. Justice Blackmun, Mr. Justice Brennan (in an opinion concurring in the judgment in *Metromedia, supra*) characterized San Diego's ban on

off-site billboards as a "total ban of a medium of communication" within that city, justifying a more stringent analysis than that applied in the plurality opinion written by Mr. Justice White. 453 U.S. at 526.

Not only would Mr. Justice Brennan require a municipality to prove that its interests could not be "served by means that would be less intrusive on activity protected by the First Amendment," (453 U.S. at 527), but he would require the municipality to demonstrate that it is committed to eliminating "other obvious contributors to an unattractive environment" (453 U.S. at 531), thus showing that its interest in aesthetics is "genuine and substantial." 453 U.S. at 533.

Adopting that approach as a test of the City's ban on attaching temporary signs to certain categories of public property is inappropriate for several reasons.

First, the approach does not command a majority of this Court. It is contrary to the approach taken by Mr. Justice White's plurality opinion in *Metromedia*. [4/] The plurality did not find that San Diego's ordinance was a "total ban" on a method of communication. More importantly, even on the scant record before it, the plurality had no trouble concluding that "the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city — are substantial government goals." 453 U.S. at 507- 508.

Accepting the legislative judgment of the city's lawmakers that such was the case, and concluding that the ordinance directly advanced that interest, Mr. Justice White stated:

[4/] Although he dissented from the result, Mr. Justice Stevens joined in Parts I through IV of Mr. Justice White's plurality opinion, thereby providing a majority to the views contained therein. 453 U.S. at 451.

> "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived an 'aesthetic harm.' (Footnote omitted.) San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures."
> 453 U.S. at 510.

As to whether the ordinance advanced the city's interest, Mr. Justice White stated:

> "If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends."
> 453 U.S. at 508.

Mr. Justice White thus concluded that, insofar as the San Diego ordinance regulated "commercial" billboards, it was not "broader than necessary to meet its interests, or that it fails directly to advance substantial government interests." 453 U.S. at 512.

Consistent with that approach, scrutiny is needed, not to test the substantiality or genuineness of the interest, but to determine whether the expressed interest merely hides an ulterior motive. (No such motive was suggested in *Metromedia*, and none is suggested here.) There is, however, no requirement that a municipality prove that it is attempting to deal with "other" contributors to an aesthetic environment before it can reduce visual clutter by regulating temporary signs.

Nevertheless, the plurality held that the San Diego ordinance was unconstitutional. The fatal flaw in the San Diego ordinance was that it treated "commercial" speech more favorably than "non-commercial" speech. (*See Metromedia, supra*, 453 U.S. at 513-514.) The Los Angeles ordinance, on the other hand, treats commercial and non-commercial signs alike.

Moreover, this case does not involve the total ban of a method of communication, and for that additional reason the court below was in error in applying Mr. Justice Brennan's analysis.

The "method" of communication involved in this case is the "temporary political sign," and Section 28.04 does not by any means totally ban such signs. To the contrary, the City permits people to carry such signs, to put them on their cars and to post them on private property located along the street if the permission of the owner is obtained. In that respect, Section 28.04 is quite unlike the prohibitions involved in *Schneider v. State*, 308 U.S. 147 (1939) (ban on distribution of handbills) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (ban on live entertainment), and the analysis appropriate for such total bans is inappropriate in this case.

Rather, this case presents a reasonable time, place and manner regulation. As such, it is valid if it (1) does not attempt to regulate on the basis of the content of speech, (2) is reasonably related to a significant governmental interest, and (3) permits ample alternate channels of expression. *Metromedia, supra*, 453 U.S. at 516; *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640 (1981); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Grayned v. City*

of Rockford, 408 U.S. 104, 116 (1972); *United States O'Brien*, 391 U.S. 367, 377 (1968).

The Los Angeles ordinance meets that test, and its constitutionality should be upheld.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted.

Dated: December 9, 1982.

Respectfully submitted,

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APPENDIX "A"

[Opinion of the Court of Appeals,
filed July 30, 1982.]

No. 80-5686
D.C. No. CV 79-0957

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation,

Plaintiffs-Appellants,

vs.

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Defendants-Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE WILLIAM P. GRAY,
DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED JANUARY 7, 1982**

Before: NELSON AND REINHARDT,
Circuit Judges, and
EAST,* District Judge

---

* The Honorable William G. East, Senior U.S. District Judge for the District of Oregon, sitting by designation.

NELSON, Circuit Judge:

Appellants, Taxpayers for Vincent ("Taxpayers") and Candidates' Outdoor Graphics Service ("COGS"), contest the constitutionality of Los Angeles Municipal Code §28.04, which prohibits the posting of signs on numerous types of public property. They brought suit against the City of Los Angeles and its representatives ("City") for declaratory and injunctive relief, claiming that the ordinance is unconstitutional on its face under the first and fourteenth amendments. The district court denied interim relief. Taxpayers and COGS then moved for partial summary judgment, reserving the issues of damages and attorney's fees. The City filed a cross-motion for summary judgment, which, after briefing and oral argument, the district court granted. Taxpayers and COGS filed a timely appeal.

In reviewing a grant of summary judgment we " 'need decide only whether any genuine issue of material fact remains for trial and whether the substantive law was correctly applied.' " *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1006 (1982) (quoting *Inland Cities Express, Inc. v. Diamond National Corp.*, 524 F.2d 753, 754 (9th Cir. 1975)). We freely review questions of law. 645 F.2d at 770.

Section 28.04 provides, in part, as follows:

> "(a) No person shall paint, mark or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any

> fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign."

The issue presented is whether the ordinance, as presently drafted, is facially unconstitutional under the first and fourteenth amendments to the United States Constitution. [1/]

[1/] Although the City has not raised the issue, a reading of the record indicates that the case might be moot. Because mootness is an element of justiciability and, hence, raises a question as to our jurisdiction, we consider the matter sua sponte. *Csibi v. Fustos*, 670 F.2d 134, 136 & n.3 (9th Cir. 1982); 6A J. Moore, *Moore's Federal Practice* Para. 57.13 and n.1 (2d Ed. 1982 and Supp. 1981-82); *see also McLaughlin v. Hoffman*, 547 F.2d 918, 919 n.2 (5th Cir. 1977) ("While neither party raises this issue, mootness is a jurisdictional question under Article III, which may be raised by the court.").

The record is somewhat sketchy regarding a showing that appellants have a continuing interest in the posting of campaign signs in regard to future elections. There is no indication that Vincent will again seek public office. COGS, however, is in the business of printing and posting campaign signs, has been employed by candidates in previous Los Angeles elections, and might reasonably be expected to be employed in future election campaigns in Los Angeles. Finally, there is no indication that the City intends to terminate its current level of enforcement of the ordinance. It therefore appears that an immediate and real controversy exists. *See Baldwin v. Redwood City*, 540 F.2d 1360, 1365 (9th Cir. 1976), *cert. denied*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977). Moreover,

> "given the frequency and brevity of local political campaigns and the length of time required to complete judicial proceedings, the issue is one 'capable of repetition, yet evading review.' *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, 316] (1911). *Baldwin*, 540 F.2d at 1365.

Because we conclude that challenges to this ordinance are 'capable of repetition, yet evading review,' we decide that this appeal is not moot.

(continued)

In a recent case, *Rosen v. Port of Oakland*, 641 F.2d 1243 (9th Cir. 1981), we suggested certain general principles that must be applied in analyzing statutes or ordinances which regulate first amendment rights:

> "*First*, the law is presumptively unconstitutional and the state bears the burden of justification. . . . *Second*, the law must bear 'a substantial relation' to a 'weighty' governmental interest. . . . The law cannot be justified merely the showing of some legitimate governmental interest. . . . *Third*, the law must be the least drastic means of protecting the governmental interest involved; its restrictions may be 'no greater than necessary or essential to the protection of the government interest.'"
>
> *Id.* at 1246 (citations omitted). 2/

Applying these general principles to the specific requirements of the ordinance, we conclude that the ordinance is unconstitutional on its face. The decision of the district court must be reversed.

1/ (cont.) We also note that Taxpayers and COGS argue that the ordinance constitutes an equal protection violation because it discriminates in favor of some classes of persons. Because we hold that the challenged ordinance is facially violative of appellants' first amendment speech interests, we do not consider the equal protection claim.

2/ A fourth general principle not applicable to the facts of this case is that the law must be drawn with "narrow specificity." 641 F.2d at 1246; *see also Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

I.

THE PRESUMPTION OF UNCONSTITUTIONALITY.

Taxpayers and COGS want to post temporary election campaign posters. The first amendment free speech guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35, 41 (1971). Further, this circuit has recognized that

> "means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election."
> *Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976), *cert. denied*, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

Thus, it is clear that significant first amendment interests are involved, the presumption of unconstitutionality applies, and the state bears the burden of justification.

II.

SUBSTANTIAL RELATION TO A WEIGHTY GOVERNMENTAL INTEREST.

The City argues that its ordinance prohibiting the posting of signs, handbills and the like on public objects is justified

by the following governmental interests: prevention of interference with the normal uses of public objects, prevention of visual clutter, and prevention of traffic hazards. As these are all legitimate governmental concerns, we will consider the relative significance of these interests and the importance of the challenged ordinance to their realization. ***Baldwin***, 540 F.2d at 1366-67.

The City's first asserted justification is that the posting of signs and hand-bills on public objects must be prohibited to prevent interference with the normal and primary uses of those objects, many of which uses are intimately connected with public safety. The Supreme Court has said:

> "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time*. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest."
> ***Grayned v. City of Rockford***, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222, 232 (1972) (quoting Wright, ***The Constitution on the Campus***, 22 Vand.L.Rev. 1027, 1042 (1969)) (emphasis added).

Although a silent vigil would not unduly interfere with the use of the reading room of a public library and is thus permitted there, ***Brown v. Louisiana***, 383 U.S. 131, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966), a person wishing to make a speech constitutionally could be prohibited from making his speech in the reading room where it would disturb those seeking the quiet of the library. Similarly, a

municipality can prohibit noisy demonstrations that disrupt the normal activities of a school. *Grayned*, 408 U.S. at 117-19, 92 S.Ct. at 2304-05, 33 L.Ed.2d at 233-34. The *Grayned* Court clearly recognized that one manner of expression might be protected in a place, while another manner of expression might not be protected in the same place. *Id.*, at 116-19, 92 S.Ct. at 2303-05, 33 L.Ed.2d at 232-34. 3/

3/ The parties expend substantial effort in arguing whether the areas in which appellants wish to post election signs are part of a traditional public forum, in which first amendment activity is rigorously protected, or, if not a traditional public forum, whether the City, by allowing some exceptions to the reach of the ordinance, has "opened" the forum to appellants.

In arguing over whether the areas are a traditional public forum, the parties rely on the influential dictum of Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16, 59 S.Ct. at 964, 83 L.Ed. at 1436-37 (Roberts, J.) (plurality opinion) (dictum).

In sustaining the constitutionality of a virtually identical San Mateo, California, ordinance that had been attacked as violative of the first amendment, the California Court of Appeals appeared to assume that public objects such as light standards and utility poles were located within the traditional public forum. *Sussli v. City of San Mateo*, 120 Cal.App.3d 1, 8, 173 Cal.Rptr. 781, 785, *cert. denied*, 102 S.Ct. 643 (1981); *Id.* at 13, 173 Cal.Rptr. at 788 (Racanelli, J., dissenting) (critical language of ordinance "purports to totally circumscribe the exercise of a

(continued)

The City argues that the ordinance is necessary to prevent posters from obscuring City signs and from obscuring or obstructing access to fire hydrants, and to ameliorate dangers to City workers who must on occasion climb utility

---

3/ (cont.) fundamental individual liberty *within traditional public forums*") (emphasis added).

The Redwood City ordinance struck down in *Baldwin* severely restricted the display of political signs on *private* property in residential areas of the city. 540 F.2d at 1373. The *Baldwin* court noted that political "[p]osters and signs are erected adjacent to 'traditional first amendment forums, such as public sidewalks, and other thoroughfares," *Alona v. Pal*, 516 F.2d 892, 893 (9th Cir. 1975) where 'expressive activity may be restricted only for weighty reasons.' *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972)." 540 F.2d at 1366 (footnote omitted). Thus, the *Baldwin* court, as well, appeared to assume that these areas adjacent to traditional public forums fall *within* the protected area.

The California Supreme Court has, in dicta, said much the same thing: "Thus, past cases have found that demonstrations and parades . . . and even the posting of signs on public utility poles (*Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 112 Cal.Rptr. 777, 520 P.2d 1) fall 'within the protective umbrella of the First Amendment.' " *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal.3d 294, 301-02, 562 P.2d 1302, 1306, 138 Cal.Rptr. 53, 57 (1977). *Dulaney*, however, expressly reserved "the question under what circumstances public property *must* be made available, if at all, as a forum for First Amendment activities." 11 Cal.3d 77, 83 n.6, 520 P.2d 1, 5 n.6, 112 Cal.Rptr. 777, 781 n.6 (emphasis in original).

Rather than merely labelling this area as within the traditional public forum, we think that something more needs to be said. In this regard, we find the framework of *Grayned* to be especially appropriate. In applying this framework, we do not mean to question the important core of Justice Robert's dictum in *Hague v. C.I.O., see supra* n.4. It is clear to us that whether a place has historically been used for the exercise of first amendment rights, as have these public objects, tells us something about how inconsistent first amendment use is with the primary use of that place. *See* Stone, *Fora Americana: Speech in Public Places*, 1974 Sup.Ct.Rev. 233, 252. This traditional use causes us to doubt whether this manner of expression is basically incompatible with the normal uses of some of the public objects at issue here.

poles. [4/] These are significant and weighty interests which, if impossible to protect by less restrictive alternatives (*see* Part III *infra*), may be sufficient to rebut the presumption of unconstitutionality.

The City's second justification for the ordinance is that it prevents visual clutter. [5/] While it is clear that promoting an aesthetic environment by reducing visual clutter is a substantial governmental interest, it is less clear that the City's ordinance is significantly related to that interest. As Justice Brennan said in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981),

> "It is no doubt true that the appearance of certain areas of the city would be enhanced by the elimination of billboards, but 'it is not immediately apparent as a matter of experience' that their elimination in all other areas as well

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[4/] We agree with the district court's "finding" that "[t]he presence of foreign materials and imperfections in utility poles are dangerous to work[ers] scaling such poles, and if poles are covered by signs and handbills, such objects and imperfections would remain unseen hazards to the life and safety of such work[ers] and could cause repairs to be delayed."

[5/] As principal support for this justification, appellees argue that the district court found as a fact that permitting the posting of temporary election signs on crosswires of public utility poles "would encourage greatly increased posting" in other places, thus entirely frustrating the purposes of the prohibition. We begin our consideration of this issue by noting that this case is before us as the result of a summary judgment. Thus, although the district court's "findings" are helpful in illuminating what the district court may have thought to be uncontested material facts, they are not findings in the strict sense, nor are they entitled to any special deference. *Gaines v. Houghton*, 645 F.2d at 768 n.13; *Heininger v. City of Phoenix*, 625 F.2d 842, 843-44 (1980); *see* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, Para. 56.02[11] (2d Ed. 1976); *see also Carter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 982-83 (9th Cir. 1980) Wallace, J., concurring).

would have more than a negligible impact on aesthetics.

Id. at 530-31, 101 S.Ct. at 2904, 69 L.Ed.2d at ____ (Brennan, J., concurring).

Before deferring to the City's judgment, we must be convinced that the City is "seriously and comprehensively addressing aesthetic concerns with respect to its environment." *Id. See John Donnelly & Sons v. Campbell*, 639 F.2d 6, 23 (1st Cir. 1980) (Pettine, J., concurring), *aff'd*, 453 U.S. 916, 101 S.Ct. 3151, 69 L.Ed.2d 999 (1981). Here the City has not offered to demonstrate that it is engaged in "a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment. In this sense, the ordinance is underinclusive." 453 U.S. at 531, 101 S.Ct. at 2904, 69 L.Ed.2d at ____. Thus, the City has failed to make a sufficient showing, even for purposes of summary judgment, that its asserted interest in aesthetics and preventing visual clutter is substantial.

The final justification asserted by the City for the ordinance is that it prevents traffic hazards. Although this, too, may be a substantial interest, and although some portion of the ordinance may properly be directed at this concern, viewing the ordinance as a whole, we find that this particular justification is insufficient as a matter of law. The City has not offered to prove facts that raise any genuine issue regarding traffic safety hazards with respect to the posting of signs on many of the objects covered by the ordinance. *See id.* at 528 and n.7, 101 S.Ct. at 2903-04 and n.7, 69 L.Ed.2d at ____ and n.7. To the contrary, it is readily apparent that no substantial traffic hazard problem would result from permitting the posting of certain materials on much of the property subject to the ordinance.

In summary, the only interest of the City that might be substantial enough to rebut the presumption of unconstitutionality of the ordinance is the interest in preventing interference with the normal and primary uses of public objects, many of which uses are connected with public safety. We now consider whether the ordinance is the least drastic means of protecting that interest.

III.

THE LEAST DRASTIC MEANS OF PROTECTING GOVERNMENTAL INTERESTS.

Taxpayers and COGS seek to attach their signs only to the cross-wires of utility poles, or other places where they would not interfere with the normal functioning of the public objects involved. They do not, for example, seek the right to post signs on fire hydrants, trees, or shrubs, or to obscure traffic or street signs. Taxpayers and COGS concede that the posting of political signs may be subject to reasonable regulation as to time, place, and manner of use, but argue that there is nothing inherent in the use of political signs which would justify an *absolute ban* against their use in public places. *See Grayned*, 408 U.S. at 115-16, 92 S.Ct. at 2302-03, 33 L.Ed.2d at 231-32; *Hague v. C.I.O.*, 307 U.S. 496, 515-16, 59 S.Ct. 954, 964, 83 L.Ed. 1423, 1436-37 (1939). We agree that there are less restrictive alternatives to banning all posting of political signs.

Instead of a general ban, the City might regulate the size, design, and construction of the posters, *Baldwin*, 540 F.2d at 1370, institute clean up or removal requirements, *id.*, or provide more stringent regulations for the areas of the City more in need of protection, *see Metromedia*, 453 U.S. at 530-31, 101 S.Ct. at 2904-05, 69 L.Ed.2d at ____

(Brennan, J., concurring). Moreover, the City might specifically prohibit the erection of signs that obscure hydrants, traffic signs, and signals, or that block motorists' lines of sight. We also think it clear that the City might prohibit the posting of signs on trees or shrubs. Thus, some specific prohibitions might be constitutional, but we cannot conclude that all those set forth in the present ordinance are.

While we cannot be certain that these alternatives we have suggested, or others that may be devised by the City, will be successful, we conclude that in light of the first amendment interests involved, some alternatives should be tried. *See United States Postal Service v. Council of Greenburg Civic Associations*, 453 U.S. 114, 154, 101 S.Ct. 2676, 2698, 69 L.Ed.2d 517,____ (1981) (Stevens, J., dissenting). *See generally* Ratner, *The Function of the Due Process Clause*, 116 U.Pa.L.Rev. 1048, 1110-11 (1968) (discussion of judicial use of less intrusive alternatives). 6/

6/ We feel that the testing of a probably effective alternative is especially appropriate where, as here, the City's present ordinance is demonstrably ineffective: the record shows that between January 1, 1980, and May 24, 1980, Los Angeles street inspection personnel removed 51,662 illegally posted signs. At least one Justice saw a similar problem in *Council of Greenburg Civic Associations*:

> "Finally, we should not ignore the fact that nobody has ever been convicted of violating this middle-aged nationwide statute. It must have been violated literally millions of times. Apparently the threat of enforcement has enabled the Government to collect some postage from time to time or to cause a few violators to discontinue their unlawful practices, but I have the impression that the general public is at best only dimly aware of the law and that numerous otherwise law-abiding citizens regularly violate it with impunity. This impression supports the conclusion that the statute is indeed much broader than is necessary to serve its limited purpose."
>
> 453 U.S. at 155, 101 S. Ct. at 2698, 69 L.Ed.2d at ____ (Stevens, J., dissenting); *see* Ratner, *supra*, at 1079, 1092.

CONCLUSION

We conclude that the City has, at best, put forth only one weighty governmental interest to which the ordinance is substantially related and has failed to convince this court that there do not exist less drastic means of protecting that interest. [7/] It has failed to rebut the presumption of unconstitutionality of the ordinance.

We, therefore, reverse the district court's grant of summary judgment in favor of the City. We conclude as a matter of law that Taxpayers and COGS are entitled to a grant of partial summary judgment and remand this case to the district court for entry of partial summary judgment in accordance with this opinion. The district court may then proceed to decide the issues of damages and attorneys fees.

REVERSED AND REMANDED.

[7/] If the City chooses to enact an alternative ordinance, its subsequent experience will serve as a test of the effectiveness of the alternative. The City may, of course, at some later date reenact the ordinance that we invalidate today, if its experience shows that the alternative is ineffective in satisfying its interests. We could then reconsider the matter in light of that experience. Ratner, *supra*, at 1110-11.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAXPAYERS FOR VINCENT, et al.,

Plaintiffs-Appellants,

v.

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES, et al.,

Defendants-Appellees.

No. 80-5686
D.C. No. CV79-0957
ORDER
Filed: September 10, 1982

Appeal from the United States District Court for the Central District of California Honorable William P. Gray, District Judge, Presiding

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Before: NELSON AND REINHARDT, Circuit Judges, and EAST,* District Judge

The Petition for Rehearing filed August 12, 1982, is DENIED.

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* The Honorable William G. East, Senior U.S. District Judge for the District of Oregon, sitting by designation.

APPENDIX "C"

**UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation

Plaintiffs,

v.

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Defendants.

NO. C 79-0957
WPG

Filed: August 6, 1980

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The above entitled cause came on regularly for hearing and the court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT

1. Plaintiff TAXPAYERS FOR VINCENT is an unincorporated association which supported Roland Vincent in his campaign for the Los Angeles City Council, Twelfth Council District, at an election held on April 3, 1979.

2. Plaintiff CANDIDATES' OUTDOOR GRAPHIC SERVICE (COGS) is a corporation organized and existing under the laws of the State of California with its principal place of business located in the City of Belmont, California. COGS provides, for compensation, a service to candidates for public office, whereby it posts signs on utility pole cross wires.

3. COGS entered into a contract with TAXPAYERS FOR VINCENT to post signs on utility pole cross wires in the City of Los Angeles in support of Roland Vincent's said candidacy.

4. The CITY OF LOS ANGELES is a charter city in the State of California. The MEMBERS OF THE CITY COUNCIL constitute the duly elected and acting legislative body of said city. EDWARD D. LONGLEY is the duly appointed Director of the Bureau of Street Maintenance of said city. Said parties are referred to herein collectively as the "defendants."

5. The CITY OF LOS ANGELES has enacted and enforces Los Angeles Municipal Code Sections 28.03 and 28.04.

6. Section 28.03 provides as set forth on Exhibit "A" to these Findings.

7. Section 28.04 provides as set forth on Exhibit "A" to these Findings.

8. When signs and handbills are posted in violation of Section 28.04, the City of Los Angeles attempts to affect

their removal. The principal responsibility for locating and physically removing such illegally posted signs and handbills has been assigned to the Street Use Inspection Division of the City's Bureau of Street Maintenance.

9. The defendants remove illegally posted signs and handbills without regard to their content; both political and nonpolitical signs and handbills are found illegally posted and are removed.

10. During the 1977-1978 Fiscal Year, the Street Use Inspection Division removed 68,869 illegally posted signs and handbills. During the first five months of 1980, said Division removed approximately 51,600 illegally posted signs and handbills.

11. The Los Angeles Planning and Zoning Code was enacted in part to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; to prevent and fight fire; to lessen congestion on streets; to facilitate adequate provisions for community utilities and facilities and to promote health, safety, and the general welfare, all in accordance with a comprehensive plan.

12. Reasonable regulation of sign placement, including a prohibition on posting signs on the items of public and utility property enumerated in Section 28.04, is of importance in accomplishing the planning purposes as set forth in Finding of Fact No. 11.

13. Without the regulation provided by Section 28.04, the indiscriminate and unregulated placement of signs on public property could seriously impede the effectiveness of the City's sign regulations, contained in the City's Planning and Zoning Code, applicable to private properties.

14. The large number of signs illegally posted on the items of public and utility property enumerated in Section

28.04 constitute a clutter and visual blight. The posting of signs on utility pole cross wires for which the plaintiffs such authorization would add somewhat to the blight and inevitably would encourage greatly increased posting in other unauthorized and unsightly places by people not aware of the distinction the plaintiffs seek to make.

15. Street lights, telephone, telegraph and other utility connecting systems require emergency and nonemergency maintenance and repairs. Such repairs are accomplished by linemen and patrolmen who are either mechanically lifted to the tops of utility poles or physically climb such poles assisted by special climbing gear.

16. The presence of foreign materials and imperfections in utility poles are dangerous to workmen scaling such poles, and if poles are covered by signs and handbills, such objects and imperfections would remain unseen hazards to the life and safety of such workmen and could cause repairs to be delayed.

17. Signs, posted on some of the objects enumerated in Section 28.04, block views and otherwise cause traffic hazards.

18. The proscriptions of Sections 28.03 and 28.04 do not prevent plaintiffs from exercising their free speech rights on the public streets and in other public places; they remain free to picket and parade, to distribute handbills, to carry signs and to post their signs and handbills on their automobiles and on private property with the permission of the owners thereof.

19. To the extent that any of the foregoing Findings of Fact may be deemed to be a Conclusion of Law, the Court so concludes.

CONCLUSIONS OF LAW

Based on said Findings of Fact, the Court makes the following Conclusions of Law:

1. The Court has jurisdiction to hear and decide this case.

2. Defendants have a legitimate and compelling interest in protecting the safety of workmen who must scale utility poles to affect both emergency and non-emergency repairs and in preventing delays in the making of such repairs.

3. Defendants have a legitimate and compelling interest in protecting the rights of owners of private property not to have others attach signs and handbills to their property without their permission.

4. Defendants have a legitimate and compelling interest in eliminating traffic hazards.

5. Defendants have a legitimate and compelling interest in improving the beauty of the City, and thus advancing both aesthetic and economic interests, by eliminating cluttering and visual blight.

6. The interests specified in Conclusions of Law Nos. 2, 3, 4, and 5, each alone, or considered together, justify a reasonable exercise of the police power.

7. A municipality may enact, within the scope of its police power, reasonable regulations affecting the time, place and manner of expression, so long as such regulations (a) do not attempt to regulate the content of expression, (b) serve one or more significant government interests, (c) permit adequate alternative means of expression, and (d) are no more restrictive than necessary to accomplish those interests.

8. Sections 28.03 and 28.04 do not seek to nor have the effect of regulating the content of expression.

9. Section 28.03 is a reasonable, place and manner regulation, necessary to advance the interests set forth in Conclusions of Law Nos. 3, 4, and 5 and is narrowly tailored to advance said interests without infringing on rights protected by the First Amendment of the United States Constitution. It is no more restrictive than necessary to accomplish such interests.

10. Section 28.04 is a reasonable, place and manner regulation, necessary to advance the interests set forth in Conclusions of Law Nos. 2, 4, and 5 and is narrowly tailored to advance such interests without infringing on rights protected by the First Amendment of the United States Constitution. It is no more restrictive than necessary to accomplish such interests.

11. Despite the restrictions imposed by Section 28.03 and 28.04, plaintiffs enjoy adequate alternative means by which to engage in expressive activities in the public streets and other public places and neither Section 28.03 nor Section 28.04 infringes impermissibly on plaintiffs' First Amendment rights.

12. The types of private, public and utility property enumerated in Sections 28.03 and 28.04, on which signs and handbills may not be posted, do not constitute an "open forum" for expressive activity.

13. Plaintiffs do not have a constitutional right, founded in the First Amendment of the United States Constitution, or otherwise to post signs and handbills on the types of public and utility property enumerated in Section 28.04, or on private property without the permission of the owners thereof.

14. Section 28.03 is a constitutionally valid exercise of defendants' police power.

15. Section 28.04 is a constitutionally valid exercise of defendants' police power.

16. Defendants have not discriminated against plaintiffs in the administration or enforcement of Sections 28.03 or 28.04, but have administered and enforced said provisions fairly and constitutionally.

17. Plaintiffs are not entitled to summary judgment in this case.

18. Defendants are entitled to summary judgment in this case.

19. To the extent that any of the foregoing Conclusions of Law may be deemed to be a Finding of Fact, the Court so finds.

DATED: August 6, 1980.

/s/ William P. Gray
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation

Plaintiffs-Appellants,

v.

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Defendants-Appellees.

NO. C 80-5686
D.C. No.
CV79-0957
Filed: September 29, 1982

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

IRA REINER, City Attorney
GARY R. NETZER,
Assistant City Attorney
ANTHONY SAUL ALPERIN,
Deputy City Attorney

1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-4230

Attorneys for Defendants-Appellees

Notice is hereby given that the Members of the City Council of the City of Los Angeles, the City of Los Angeles, and Edward D. Longley as Director of the Bureau of Street Maintenance of the City of Los Angeles hereby appeal to the Supreme Court of the United States, from the entire decision of the United States Court of Appeals for the Ninth Circuit, opinion filed on June 30, 1982, and petition for rehearing denied on September 10, 1982. This appeal is taken pursuant to 28 United States Code Section 1254(2).

DATED: September 29, 1982.

IRA REINER, City Attorney
GARY R. NETZER,
Assistant City Attorney
ANTHONY SAUL ALPERIN,
Deputy City Attorney

By /s/ Anthony Saul Alperin
ANTHONY SAUL ALPERIN
Deputy City Attorney

Attorneys for Defendants-Appellees

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAXPAYERS FOR VINCENT, an unincorporated political association, and CANDIDATES' OUTDOOR GRAPHICS SERVICE (COGS), a California corporation,

Plaintiffs-Appellants,

v.

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES; and EDWARD D. LONGLEY as Director of the Bureau of Street Maintenance for the City of Los Angeles,

Defendants-Appellees.

NO. C 80-5686
D.C. No.
CV79-0957

CORRECTION TO
NOTICE OF APPEAL
TO THE SUPREME COURT OF
THE UNITED STATES

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The Notice of Appeal to the Supreme Court of the United States, filed herein, contains a clerical error on page 2, line 6. The date on which the opinion of the Court of Appeals was actually filed was July 30, 1982, and the Notice of Appeal should have reflected that date.

DATED: December 1, 1982.

Respectfully submitted,

IRA REINER, City Attorney
GARY R. NETZER,
Assistant City Attorney
ANTHONY SAUL ALPERIN,
Deputy City Attorney

By:/s/ Anthony Saul Alperin
ANTHONY SAUL ALPERIN
Deputy City Attorney

Attorneys for Defendants-Appellees

APPENDIX "E"

SEC. 28.04. HAND-BILLS, SIGNS-PUBLIC PLACES AND OBJECTS:

(a) No person shall paint, mark or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamp post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, life boat or other life saving equipment, street sign or traffic sign.

(b) Nothing in this section contained shall apply to the installation of terrazo sidewalks or sidewalks of similar construction, sidewalks permanently colored by an admixture in the material of which the same are constucted, and for which the Board of Public Works has granted a written permit.

(c) Any hand-bill or sign found posted, or otherwise affixed upon any public property contrary to the provisions of this section may be removed by the Police Department or the Department of Public Works. The person responsible for any such illegal posting shall be liable for the cost incurred in the removal thereof and the Department of Public Works is authorized to effect the collection of said cost.

(d) Nothing in this section shall apply to the installation of a metal plaque or plate or individual letters or figures in a sidewalk commemorating an historical, cultural, or artistic event, location or personality for which the Board of Public Works, with the approval of the Council, has granted a written permit.

(e) Nothing in this section shall apply to the painting of house numbers upon curbs done under permits issued by the Board of Public Works under and in accordance with the provisions of Section 62.96 of this Code.